CHAPTER I

EVOLUTION OF LEGISLATION AFFECTING COLLECTIVE BARGAINING IN THE RAILROAD AND AIRLINE INDUSTRIES

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In 19th Century America the railroads were the essential means of transport. Indeed, trains—passenger and freight—played a crucial role in the transformation of the United States from a sparsely settled nation, largely composed of relatively self-sufficient and isolated farming communities, into an industrial urbanized giant.

In 1830, the country as a whole boasted only twenty-three miles of operating railroad track. Some thirty years later, in 1862, that figure had climbed to 32,120. During the Civil War the fever to bring ever more land within the orbit of railroad service diminished only to resume with even greater fervor once the North and South were reunited.

Until the early 1860's, the individual states played the key role in encouraging railroad building. In 1862, with the passage of the Pacific Railroad Act, the Federal government also stepped in, granting loans and land to companies willing to build east-west lines that would link the two coasts. By 1869, with 46,844 miles of track in operation, that linkage was achieved.

The advent of the railroad played a major role in settling the American West. The railroads, eager to profit from the public land they had acquired from the government, actively encouraged easterners and immigrants alike to settle the vast open lands. Would-be entrepreneurs, farmers and ranchers eagerly responded to the opportunity, since eastern markets were now open to the supply of western wheat and cattle and the region's mineral and timber wealth as well. Those who shipped agricultural and mineral products to be consumed and processed in the cities in their turn became equally dependent upon a return flow of manufactured goods. So far as the cities themselves were concerned, by the 1880's the interurban railroads encouraged the enlargement of urban centers and the growth of the suburbs. Middle and upper class city dwellers now began to escape the noise and dirt of the mill and factory.

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The railroad's impact upon the society was not wholly beneficial, however. Illicit financial relationships were common between politicians and bureaucrats on the one hand and transcontinental and interurban rail operators on the other. For example, both rail franchises and Senate seats were sometimes commodities for sale. Those with political influence rode the trains free. The larger producers and shippers often received rebates from roads eager for their business at the expense of those far less able to pay. Tariffs were based on the presence or absence of competing carriers rather than length of haul. Complaints concerning exorbitant rates charged to haul products to market thus were frequent. As agricultural production increased and prices consequently fell, the railroads were also accused of keeping the lands they still retained off the market for speculative purposes, thus depriving the farmer of the opportunity to increase his production in the attempt to offset the drop in prices.

The importance of the railroad as the nation's economic pace-setter and the outcries of those who felt helpless to oppose the practices of the giant corporations did not go unnoticed. By the 1870's, Congress was considering ways to curb the railroads' unlimited power to set rates. When these first congressional deliberations failed to produce statutory results, a number of states acted on their own to pass the so-called "Granger Laws," intended to end rate-setting abuses. In 1877, the Supreme Court upheld those states' right to do so.[1] However, nine years later, in the *Wabash* case, the Court held differently: only Congress could set the rates of any railroad in interstate commerce.[2] In 1885, in response to growing public dissatisfaction with the practices of an industry that played such a vital role in the nation's economic life, a Senate Committee—the Cullom Committee—had held hearings throughout the country to hear the public's complaints. The Committee's report, recommending Federal regulation of railroads in interstate commerce, coupled with the decision in the *Wabash* case, led to passage, in 1887, of the Interstate Commerce Act. This was the first in a series of statutes which have brought more and more aspects of interstate transportation—rail, air, motor carrier, barge and pipeline alike—under Federal control. In the short run, the new legislation and its implementing agency, the Interstate Commerce Commission, were able to do little to alleviate the problems which it faced. But in establishing the principle that the Federal government had the right to regulate many aspects of the economic life of industries vital to the whole economy and to set up regulatory agencies to enforce Federal rules, the legislative precedent was of fundamental importance.

For example, it was quickly asserted that the Federal interest went beyond railroad rates and rail-shipper relations alone. If the railroads'

1. *Munn v. Illinois*, 94 U.S. 113 (1877).
2. *Wabash, St. L. & P. Ry. v. Illinois*, 118 U.S. 557 (1886).

services were vital to the nation, the public ought to be able to depend upon their regular availability. Thus, labor-management disputes that erupted into work stoppages could not be viewed solely as "family" quarrels between the employer and his employees. Such matters too were affected by the public interest. Initially, the government's reaction to railroad strikes was to come in heavily on the side of the carrier to end them quickly and forcibly. The 1877 strike serve a a good example. The stoppage was primarily due to repeated wage cuts resulting from the 1873 Depression. But because it affected major lines in most parts of the country many saw it as a kind of "general strike" and approved the use of Federal troops to keep mail, freight and passengers moving on schedule. In short, regardless of the causes that led the union to strike, it, not the carrier, bore the burden of public dissatisfaction that crystallized into an insistence that the government should intervene to protect the general interest.

Railroad Labor Legislation Prior to 1926

As had been the case with rate regulations, several of the states led the way in attempting to assist rail labor and management in the amicable adjustment of their disputes. Most of these early state laws did little more than propose special applications of already generally recognized principles of arbitration.[3] The first such state law was enacted in Maryland in 1878. It provided that the parties mutually submit unresolved disputes to tribunals composed of individuals appointed by a local judge and chaired by him. Though submission to such tribunals was voluntary, the award was to be binding and could be enforced by the judge. Costs were to be shared by the parties. Similar laws were enacted during the following decade by the states of New Jersey, Pennsylvania, Ohio, Iowa and Kansas. In 1886, Massachusetts and New York also enacted arbitration laws, but made a significant departure by establishing permanent three-member arbitration boards appointed by the governor. In the following year both of these boards were given the added power to conciliate and mediate, a step they could take on their own initiative. As has so frequently been the case with social legislation in the United States, these evolutionary steps by the states became the model for subsequent congressional action in the field.

A resolution by the U.S. Senate as early as 1882 had directed its Committee on Education and Labor to investigate the causes of strikes and to recommend legislation both to remove such cause and prevent their recurrence. The Committee held hearings in 1883 and published

3. This state legislation, and a rather substantial body of European experimentation which led the way for it, is detailed in Joshua Bernhardt, *The Railroad Labor Board*, Baltimore: Johns Hopkins Press, 1923, pp. 2–7.

the testimony it had heard in 1885,[4] but never issued any report or recommendations as such. The House of Representatives' Committee on Labor, which had also been considering the strike problem for several years, reported out a bill in early 1886 which recommended voluntary arbitration but allowed no independent initiative by the government.[5] Congress took no action during these years largely because no major railroad strikes occurred.

Arbitration Act of 1888

In 1886, industrial strife again broke out on the railroads, in this case against the Gould Railway System in the Southwest. Although President Cleveland recommended at the time that a voluntary arbitration tribunal be created, Congress did not act until 1888 when yet another bloody railroad strike occurred, this time against the Chicago, Burlington and Quincy. Under the Arbitration Act of 1888, the first federal statute dealing with the problem, two means were provided for the adjustment of labor disputes between the railways and their employees—voluntary arbitration and investigation. Both parties could voluntarily agree to submit a dispute to a three-member board of arbitrators. In addition, the President was authorized to appoint a three-member commission to investigate the causes of any railroad labor dispute. Such a commission could be set up on the President's own initiative, at the request of one of the parties to the dispute, or at the request of the governor of any state.

Although the Arbitration Act of 1888 existed unamended for ten years, in no case was any labor dispute on the railroads arbitrated under it. Interestingly, however, the voluntary arbitration feature of the Act of 1888 was retained in subsequent railroad labor legislation even to the present time.

The investigatory provision of the law was invoked by the President in the Pullman strike of 1894. This strike too had been caused by wage cuts coupled with the fact that the company did not reduce the rents its employees had to pay in the company-owned town of Pullman, Illinois. Despite the fact that the Illinois Governor did not ask for Federal assistance—and, indeed, protested when it was nevertheless provided—the U.S. Attorney General (a former Chicago, Burlington & Quincy attorney still on retainer at the time of the strike) made certain that a sweeping injunction against the strikers and their leaders was issued and that Federal troops were called in at the first sign of a minor infraction. The strike had thus been broken by the time the Presidential

4. *Report of the Committee of the Senate upon the Relations between Labor and Capital*, 4 vols., 1885.
5. The legislative history of this bill may be found in "Government Industrial Arbitration," U.S. Bureau of Labor Bulletin 60 (1888).

Commission could make its report. The recommendations did lead, however, to the next congressional enactment in the field.

Erdman Act of 1898

As a result of the inadequacy of the Arbitration Act that was demonstrated during the Pullman Strike, Congress began considering alternatives. Finally, in 1898, it passed and the President approved the Erdman Act. The new law omitted the investigatory features of the Act of 1888, but continued the arbitration aspects of the old law. More significantly, it introduced for the first time the possibility of mediation of railroad labor disputes. By its provisions, the U.S. Commissioner of Labor and the Chairman of the Interstate Commerce Commission, at the request of either party to a railroad dispute involving operating workers, were to make every effort to settle the dispute by mediation and conciliation. If these efforts failed, the mediators were again to urge voluntary arbitration upon the parties. One original feature of the new law was a section prohibiting employer discrimination against an employee because of union membership. This anti-discrimination provision, to the extent it was enforceable by prison sentences, was later declared to be unconstitutional by the Supreme Court.[6]

Within one year of the passage of the law, a union requested mediation proceedings but the railroads involved in the dispute refused to participate. For the next seven years following 1898 the Erdman Act was not used in a railroad labor dispute. Between 1906 and 1913, however, a total of sixty-one cases were settled under the Act, ordinarily by mediation and a few by arbitration. The major contribution of the Erdman Act in the evolution of railway labor legislation was to demonstrate the important role that mediation could play in the settlement of labor disputes.

Newlands Act of 1913

In recognition of the importance of mediation rather than arbitration in the settlement of labor disputes, amendments to the Erdman Act were adopted in 1913 which became known as the Newlands Act. This Act established a *permanent* board of mediation and conciliation for railway labor disputes. Its jurisdiction covered disputes over the negotiation of agreements and, in an important innovation, those arising out of the interpretation of agreements as well. For the next several years, the services of the Board of Mediation and Conciliation were frequently invoked, with apparent success.

In 1915, however, a number of railroad labor organizations initiated a movement for an 8-hour work day and refused to arbitrate or permit the mediation of the issue. Their position was apparently based on disap-

6. *Adair v. U.S.*, 208 U.S. 161 (1908).

pointment over a recent unfavorable arbitration award and a desire to demonstrate that they had sufficient economic strength to strike the railroads successfully if their demands were refused. When a strike date was set on this dispute, the workers agreed to forego strike action only if an 8-hour day were enacted into Federal law. In response, in the Adamson Act of 1916 Congress provided for an 8-hour work day on the railroads.[7]

Federal Control of Railroads, 1917–1920

During World War I the Federal government took control of the nation's railroads, placing them under a Railroad Administration and its Director General. One consequence of this action was to greatly strengthen the unions vis-a-vis the carriers. For example, workers could not be discriminated against for union membership. More importantly, the Director General made a number of *national* agreements with the standard labor organizations—the first rail system-wide agreements in the industry. Finally, national boards of adjustment were created to handle grievances arising out of the interpretation of agreements. Perhaps because it was a wartime period, or perhaps because of these innovations affecting the railroad collective bargaining relationship, the war years and those immediately following them were times of relative labor-management harmony in the industry.

Transportation Act of 1920

When the railroads were returned to private ownership after the war, there was considerable sentiment in Congress for amending the Newlands Act of 1913. Many legislators wished to retain at least some of the elements of government control of rail labor relations that had evolved during the period of wartime control. The Senate, for example, enacted a bill providing for compulsory arbitration of disputes, but it failed to be accepted by the House. The 1920 law which finally was passed was a compromise, though it borrowed heavily from the wartime experience. All unresolved disputes were to be referred to a newly-created U.S. Railroad Labor Board for "hearing and decision." Adjustment boards for resolving grievances were to be created by the parties. The Labor Board was to carry out both mediation and arbitration functions, a feature which pleased neither railroad labor nor management. Nevertheless, the Board was quickly swamped with cases. The unions were determined to retain their gains of the war years, while the railroads were equally determined to erode them. The resultant prob-

7. When the Adamson Act came before the Supreme Court in the case of *Wilson v. New*, 243 U.S. 332 (1917), the Court in upholding its constitutionality asserted that Congress was using "its authority to compulsorily arbitrate the dispute." This is one of the earliest suggestions that Congress had the authority to enact legislation to require compulsory arbitration of labor disputes.

lems eventually discredited the Board despite the fact that during the five years of its life it handled about 13,000 disputes, for the most part successfully.[8] In failing to rely primarily on voluntary collective bargaining assisted principally by mediation to resolve interest disputes, the Transportation Act of 1920 was not attuned to the basic ethos of employee-management relations as it was developing in the United States.

Railway Labor Act of 1926

Legislative History

It was apparent rather early that the Transportation Act of 1920 and its administrative agency, the Railroad Labor Board, were not to be successful in keeping peace in the railroad industry. The Board was repudiated by the unions in the shopcraft strike of 1922. The Pennsylvania Railroad ignored the Act and refused to disestablish its company-dominated unions. The law became completely ineffective when the Supreme Court rejected the Board's application for enforcement of a decision directing the carriers to cease dealing with their dominated organizations.

During 1923–24, the Secretary of Labor and both Presidents Harding and Coolidge asked for changes in the 1920 Act. The platform of the Republican Party in 1924 provided that the 1920 law should be amended, stating:

> Collective bargaining, mediation, and voluntary arbitration are the most important steps in the maintaining of peaceful labor relations and should be encouraged. We do not believe in compulsory action . . . Therefore the interests of the public require the maintenance of an impartial tribunal which can in an emergency make an investigation of the facts and publish its conclusions.

The 1924 Democratic Party platform was not as specific but did agree with the Republicans that the 1920 Act had "proved unsatisfactory and must therefore be rewritten."

Pursuant to these developments, a number of bills were dropped in the Congressional hopper to amend the 1920 Act, the most important being the Howell-Barkley Bill of 1924. This proposal had been drafted by the attorney for the railway labor organizations, Donald R. Richberg, and his assistant, David E. Lilienthal.[9] Thus, it had the support of the railway labor organizations and was also backed by Samuel Gompers and the AFL. Congress did not act on the bill, however, because the

8. Jacob J. Kaufman, *Collective Bargaining in the Railroad Industry*, New York: Kings Crown Press, 1954, p. 65.
9. Irving Bernstein, *The Lean Years*, Boston: Houghton Mifflin Co., 1960, p. 216.

carriers asked for more time on the ground that the Railroad Labor Board should be permitted to try to work out its problems.

In December of 1924, President Coolidge again urged the carriers and the railroad unions to jointly work out a procedure to ensure labor peace in the industry. During 1925, a committee of railway executives met with union representatives and a draft bill similar to the earlier Howell-Barkley proposal was agreed upon. When the parties jointly presented the bill to Congress in January, 1926, Richberg testified:

> I want to emphasize again that this bill is the product of a negotiation between employers and employees which is unparallelled, I believe, in the history of American industrial relations.
>
> For the first time representatives of a great majority of all the employers and all the employees of one industry conferred for several months for the purpose of creating by agreement a machinery for the peaceful and prompt adjustment of both major and minor disagreements that might impair the efficiency of operations or interrupt the service they render to the community. They are now asking to have this agreement written into law, not for the purpose of having governmental power exerted to compel the parties to do right but in order to obtain Government aid in their cooperative efforts and in order to assure the public that their interest in efficient continuous transportation service will be permanently protected.[10]

Supported jointly by the railroad industry and its unions, and opposed only by the National Association of Manufacturers, the new bill was passed 381 to 13 by the House in March and 69 to 13 by the Senate in May, 1926. No changes of substance were made in the course of hearings or enactment, despite some attempt by President Coolidge to persuade the carriers and unions to accept amendments proposed by the NAM. When these efforts failed the President signed the Railway Labor Act on May 20, 1926. Despite a number of amendments, several fundamental but most minor, the Act remains operative legislation fifty years later. As such, it is the oldest continuous Federal collective bargaining legislation in the Nation's history.

Nature of the 1926 Act

The underlying philosophy of the law was, as it still is, almost total reliance on collective bargaining for the settlement of labor-management disputes.[11] When bargaining broke down, the law provided for

10. "Railroad Labor Disputes," Hearings before the House Committee on Interstate and Foreign Commerce, 69th Congress, 1st Session, (1926) p. 9.
11. The text of the Act, as amended, may be found in Appendix A.

mandatory mediation but arbitration only if the parties agreed. A major innovation was the specific provision for creation by the President of emergency boards, a device by which neutrals might make non-binding recommendations for procedures and terms on which a dispute might be settled. Reliance was thus based on the hope that public opinion would force compliance with otherwise non-enforceable decisions and recommendations.

It is apparent when one contrasts the Act of 1926 with the predecessor enactments that the new law was actually a composite of a number of the major voluntary features of railroad labor laws going back to 1888. What was avoided was the concept acceptable only during the war but embodied in the 1920 Act, that any neutral body should "decide" the terms of railroad labor agreements. In short, the new law reflected joint agreement by railroad labor and management upon voluntary rather than compulsory means of settlement of labor disputes. It was jointly acceptable perhaps only because so little in the statute was strikingly original.

It also became apparent fairly shortly after 1926 that agreement on some of the key provisions of the new law had been possible only because the parties had decided to agree. Underlying disputes as to what they had really meant and intended in the new statute continued to crop up. The Act's five basic purposes were set forth in Section II:

1. To prevent the interruption of service.
2. To ensure the right of employees to organize.
3. To provide complete independence of organization by both parties.
4. To assist in prompt settlement of disputes over rates of pay, work rules, or working conditions.
5. To assist in prompt settlement of disputes or grievances over interpretation or application of existing contracts.

Although the carriers had agreed that the representatives of the parties should be chosen "without interference, influence or coercion by either party over the designation of representatives by the other" it soon became apparent that a number of roads had no intention of disestablishing or ceasing dealings with their existing company-dominated unions. These company unions covered shopcraft employees on most of the Nation's roads (resulting from the defeat of the shopmen in 1921-22) and a smaller number of their clerks and maintenance-of-way employees. Perhaps relying upon the fact that the Act of 1926 neither created an enforcement procedure to require the dismemberment of company unions nor imposed a penalty on carriers that continued to deal with such unions, some major roads immediately began to resist the free choice concept of the new statute.

The history of the establishment of representation rights in the

industries covered by the 1926 Act and its amendments is dealt with by Dana Eischen in Chapter II of this volume.

The machinery created by the original Act of 1926 designed to dispose of grievances arising out of the interpretation and application of contracts proved to be an almost total failure. The language of the new statute concealed, without resolving, a basic disagreement between the carriers and the unions. The unions had been extremely pleased with the results they had derived from national boards of adjustment imposed by the government during World War I and they sought to maintain them in the new statute. The carriers were equally determined to maintain grievance resolution at the individual system level. At heart this disagreement was another manifestation of the company-dominated union problem; namely, the role such unions were to play in the resolution of grievances. With arbitration or adjustment boards created at the national level, the standard trade unions would achieve complete control of the grievance mechanism and largely deprive the dominated local unions of any real function. Under a system of local boards the company unions would continue to play an important role. The 1926 statute left the matter in limbo. The parties might agree on national boards if they wished but were not required to do so: Nothing prohibited an individual carrier from agreeing with local unions to settle grievances on a local basis. This permissive language permitted a railroad to create a grievance procedure with its company-dominated unions and freeze out the standard trade unions. This underlying difference of intent was not resolved until the 1934 amendments to the Act.

A major feature of the 1926 Act was to set forth a specific procedure for settling disputes over the terms of new or renewed agreements. The basic mediation function under the Act was to be undertaken by a five-member Board of Mediation. The parties were required to give 30-days notice of a desire to reopen contracts and, failing agreement, the Board was to mediate. If agreement did not result from this stage, the Board was to attempt to obtain the parties' agreement to submit the dispute to arbitration. The not infrequent success of such efforts are described by Benjamin Aaron in Chapter V of this volume. The mediation activities of the Board of Mediation and its successor, the National Mediation Board created by the 1934 amendments to the Act, are described by Beatrice Burgoon in Chapter III.

As indicated, the one major innovation in the 1926 statute was the detailed provision for procedures which would eventuate in the event mediation failed and one or both of the parties proved unwilling to arbitrate. In a dispute that would in the judgment of the Board "threaten substantially to interrupt interstate commerce" the President might, "in his discretion," create an *ad hoc* emergency board "to investigate and report respecting such disputes" within thirty days.

During this period, any carrier involved was to refrain from changing conditions of employment and employees were prohibited from striking. The operation of these *ad hoc* boards, which have come to be known as Presidential emergency boards, and their impact upon collective bargaining are discussed by Donald Cullen in Chapter VI.

The mediation and fact-finding functions provided for under the Act were apparently not a source of dispute between the carriers and the unions during the remainder of the 1920's and most of the 1930's. The Board of Mediation enjoyed considerable success in resolving disputes over new contracts. Railroad strikes all during this period were few and those that occurred for the most part had little impact on the public. Because of these circumstances many began to point to the Railway Labor Act as a "model labor law." As several commentators have pointed out, however, this was the period of the Great Depression. Unions were weak, wage movements not of pressing importance, and technological change was not forcing wrenching interactions with traditional work rules. The fact that most labor disputes were settled peacefully during these years was due as much or more to the economic circumstances of the time rather than a result of the special genius of the Railway Labor Act of 1926.

Constitutionality of the 1926 Act

A test of the constitutionality of the new statute was not long in the making. In May, 1927, the Brotherhood of Railway Clerks presented the Texas and New Orleans Railroad with a set of proposed wage improvements. Despite the fact that the carrier had bargained with the Clerks for years, it decided to discharge union members and only deal with a newly-created company union called the Association of Clerical Employees—Southern Pacific Lines. The Clerks sought an injunction to restrain the carrier from interferring with the employees' right to select their own representatives under Section 2 of the Act. The Carrier responded that the Railway Labor Act was unconstitutional in that it violated the Company's rights guaranteed under the First and Fifth Amendments to operate its property, including the selection and discharge of employees, as it saw fit.

The case reached the Supreme Court several years later, and the Court disagreed. It had no doubt of Congress' right to prohibit interference in the choice of bargaining representatives under its constitutional power to regulate commerce. Moreover:

> The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them. The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing. As the carriers subject to the act have no constitutional right to

> interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds.[12]

The next test of the Act's reach was made by the Virginian Railway Company in the 1930's. There the carrier, despite the fact that the Mediation Board had certified a bargaining agent of its employees, continued to deal only with the company union it had created after the defeat of the shopmen in 1922. Underlying the dispute was the issue of whether the duty placed on the parties in Section 2, to exert every reasonable effort to reach agreement, was simply hortatory language or could be judicially enforced. The Court held, "it is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts."[13] The company was ordered to recognize the certified union and begin bargaining with it as the statute required. Years later a narrowly-divided Supreme Court carried this decision a step further, and held that if the bargaining which had taken place was essentially a sham without a real intent on the part of one or the other of the parties to reach agreement, the "good faith" obligation too may be enforced by court order.[14]

Many other cases interpreting the 1926 Act have of course come before the courts over the years. The more important of these will be discussed in their appropriate context in the chapters which follow. Here it might simply be noted that there are only two other situations in which the Supreme Court has authorized the Federal courts to enjoin bargaining behavior under the Railway Labor Act. In the first of these, the courts can force the parties to maintain the status quo during the whole of the bargaining period in order that the available statutory mechanisms be given the opportunity to induce a negotiated settlement.[15] In the second case, unions under the Railway Labor Act were thereafter required to represent fairly all those employees for whom they are the designated representative, without hostile discrimination against any of them.[16] This 1944 decision, outlawing discrimination against Black members, has been said to foreshadow not only *Vaca v. Sipes* on the general duty of fair representation, but also the Court's

12. *Texas & New Orleans Railroad Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548 at 570 (1930).
13. *Virginian Railway Company v. System Federation No. 40*, 300 U.S. 515 at 548 (1937).
14. *Chicago and North Western Railway Co. v. United Transportation Union*, 402 U.S. 570 (1971).
15. *Detroit & Texas and St. Louis Railway Co. v. United Transportation Union*, 396 U.S. 142 (1969).
16. *Steele v. Louisville and Nashville Railroad*, 323 U.S. 192 (1944).

seminal decision in *Brown v. Board of Education* that in public education "the doctrine of 'separate but equal' has no place."[17]

Amendments to the Railway Labor Act of 1926

Although the 1926 Act had proven reasonably successful in inducing peaceful settlement of contract disputes, it had, as noted earlier, failed to establish freedom of association where it did not exist. As late as 1933, for example, 147 of the 233 largest railroads still maintained company unions.[18] The underlying reason for the continuance of this practice despite the enactment of the statute was that the 1926 Act lacked enforcement machinery and imposed no effective penalties for non-compliance. As also indicated earlier, the law permitted the parties to create local system boards of adjustment and as a result substantial numbers of railroad employees, perhaps a majority, had no neutral mechanism for resolution of their grievances. Following the election of Franklin D. Roosevelt as President in 1932, the chief executives of the railway labor organizations, heartened by what they hoped was a changed political climate, met to draw up new legislation designed to strengthen and enforce the rights of self-organization and collective bargaining already existing.

Their first opportunity to do so came even before President Roosevelt took office. In the first months of 1933, nearly fifty railroads were either in or near bankruptcy. The unions were able to obtain amendments to the Bankruptcy Act guaranteeing the rights granted in the 1926 Act and going further to outlaw both the yellow-dog contract and the closed shop. Though from today's vantage point the last hardly looks like a union victory, at that time legislation preventing a carrier from requiring employee membership in a company-dominated union was very valuable to the national unions. Later that year these labor provisions affecting bankrupt carriers were extended by the Emergency Railroad Transportation Act of 1933 to the whole industry.

The 1934 Amendments

In early 1934, the heads of a number of major railroad unions called on President Roosevelt to support their proposed amendments to the 1926 Act. At his suggestion they met with Transportation Coordinator Joseph B. Eastman and reached agreement on a bill that was sent to Congress, although without Roosevelt's endorsement. The railroad carriers did not directly oppose the bill before Congress but suggested a substantial number of limiting or crippling amendments. Finally, after

17. Benjamin Aaron, "The Union's Duty of Fair Representation under the Railway Labor and National Labor Relations Acts," *Journal of Air Law and Commerce*, Vol. 34, Spring 1968, pp. 167-207.

18. Irving Bernstein, *The New Deal Collective Bargaining Policy*, Los Angeles: University of California Press, 1950, p. 43.

much legislative and political maneuver the Democratic Congress passed the amendments to the Railway Labor Act. The President signed them on June 21, 1934. In general, the amendments were hailed by the national labor organizations as an impressive legislative victory.

First, the 1934 amendments carried forward into the revised Railway Labor Act the gains of the Bankruptcy and Emergency Railroad Transportation Acts. Yellow-dog contracts and company-sponsored or dominated unions were barred. The carriers were not to influence employees in their choice of representatives and were directed to bargain collectively with certified representatives. The ban on the closed shop was continued, although now despite some union opposition.

Second, the amendments provided for the establishment of a permanent, bipartisan National Board of Adjustment, to which grievances might be submitted by either party. Provision was made for neutral referees in case the partisan members of the Board could not agree and for the enforceability of Board orders in court. The history of the National Railroad Adjustment Board (NRAB), and its successes, failures and substitutes, is detailed by Jacob Seidenberg in Chapter VIII of this volume.

Third, the Board of Mediation of the 1926 Act was renamed the National Mediation Board and reduced from five to three members. This reduction was ostensibly because the Board's workload no longer included grievance disputes. The new Board was empowered to conduct representation elections, however.

The 1934 amendments to the 1926 Act represent the last changes of major importance in the collective bargaining legislation affecting railroads in the nation's history. Moreover, in some respects they were an important precursor of elements of the National Labor Relations Act which followed a year later.

The 1936 Amendments

In 1936, the provisions of the Railway Labor Act were extended to air carriers. The chief lobby favoring this amendment was the Air Line Pilots Association, then the only union in this new industry. The one exception to the general extension of the Act from one industry to another was that it was made optional whether a National Air Transportation Adjustment Board would be created. In fact, the air transportation industry and its unions have always preferred to maintain local system boards for grievance resolution. The experience of the airlines under the Railway Labor Act is related by Mark Kahn in Chapter IV.

Further Amendments

In 1940, a minor amendment to the Act clarified its coverage as it affected certain rail operations in coal mines.

In 1951, the legislative decision of 1934 to continue the prohibition of the closed shop, which some unions by then had opposed, was substantially reversed. The union shop was made a permissible form of required union membership. In addition, dues deductions were permitted.

In 1964, the term of office of members of the Mediation Board was clarified, and a member whose term had expired was asked to continue in office until his successor was appointed and confirmed.

Almost as soon as it was created the caseload of some divisions of the NRAB became too heavy and decisions ever-farther behind. In 1966, Congress approved the creation of Special Adjustment Boards to hear and resolve grievances on the local properties. In 1970, Congress changed the permanent membership of the NRAB to 34, half appointed by the carriers and the other 17 by that number of national labor organizations.

Summary

From the foregoing, it is apparent that railroad labor relations have always held a special position in the United States. With the exception of the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, our general labor law has never been applied to the railroad industry. This is true not only of legislation affecting railroad collective bargaining. The pension system for railroad employees was established independently under the Railroad Retirement Act of 1935. Not until 1974, and then only partially, was it blended with the general Social Security system. Similarly, unemployment insurance for railroad employees was established separately under the Railroad Labor Unemployment Insurance Act of 1933. After World War II, this Act was extended to include death, disability, and sickness insurance programs, still independent of the general body of social welfare legislation.

This independent legislative treatment of railroad employment relations undoubtedly lies in two special characteristics of the industry. The railroad work force is national in scope, representing approximately the same percent of the population in each state. The industry carries freight in every state except Hawaii. Hence, on those legislative issues upon which railroad labor and management can agree, the industry and its unions speak to almost all legislators with equal strength and receive equal attention. In short, part of the answer for the special treatment of railroad labor relations lies in the industry's unusual lobbying strength and has resulted in the parties receiving much of what they have been willing to seek jointly.

Of equal or greater significance as a reason for special railroad labor legislation is an historic and pervasive belief that the national welfare necessitates uninterrupted railroad service. This belief has long dominated congressional action in the field of railroad labor legislation.

While it has been challenged from time to time in recent years, the conventional wisdom that a national railroad strike cannot be tolerated is probably still believed by the large majority of the Congress and the public. This same influence was certainly not valid for the air transport industry when it was brought under the Railway Labor Act in 1936. Even today, some contend that a national airline strike would represent no real threat to the national health, safety, or general welfare. It is nevertheless true that were a national air transport strike ever to occur its impact upon the opinion molders and policy makers in this nation would be immense and would be reflected in considerable pressure for immediate governmental action to end the stoppage. It can reasonably be concluded that special treatment of railroad and airline collective bargaining, including severe constraints on the parties' right to undertake national strikes or lockouts, is still generally thought desirable.

Rail and Air Collective Bargaining Structure

Neither the rail nor the air transport industrial relations environment can be described simply. Both industries operate in all regions of the United States. There are about seventy line-haul Class I railroads in the nation, as well as about four hundred small feeder, switching and terminal railroads. Over thirty air carriers are certified to provide scheduled domestic and international service, although a dozen of these furnish more than eighty percent of the total revenue miles of cargo and passenger service.

Over twenty so-called standard railroad unions hold representation rights in the railroad industry along with nine unions representing railroad-employed marine workers and a number of local unions and system associations. The number of unions that have held bargaining rights in the industry at one time or another must approach seventy-five. Today many rail negotiations take place on a national basis, however, covering most major carriers as well as groups of unions. Each major air carrier negotiates with perhaps a half of the dozen or so unions holding bargaining rights on the airlines. Unlike the railroads, each airline negotiates independently with its own unions.

Given the multiplicity of employers and unions in both industries, one must be very cautious about generalizations. Certain features are characteristic of collective bargaining in them as a whole, however, and in both industries the structure of collective bargaining is influenced by the statutory activities of the National Mediation Board.[19]

19. A more detailed discussion of these matters may be found in Harold Levinson, et al., *Collective Bargaining and Adjustment to Technological Change in American Transportation*, Evanston, Illinois: The Transportation Center, Northwestern University, 1971, particularly Part II, on railroads, by Charles M. Rehmus and Part IV, on airlines, by Mark L. Kahn.

The Railroad Bargaining Structure

Unlike almost all other industrial relationships in the United States, railroad collective bargaining agreements are not commonly of a fixed duration. Instead, periodic requests for wage and rules changes may be raised by either party simply by filing notice of intent to change an existing agreement, a so-called Section 6 notice under the Railway Labor Act. For many years, however, the parties have agreed upon moratoria that eliminate the obligation to bargain on specified subjects for specified periods. Such moratoria do not bar the raising of other issues in the interim, however.

A second major characteristic of rail bargaining, followed for over a generation, is an agreement between representatives of the carriers and unions to conduct many of their collective bargaining negotiations on an industry-wide basis. Such negotiations are generally referred to as "concerted" or "national" wage or rules movements. Such movements are usually initiated by a single union or groups of unions serving largely identical Section 6 notices simultaneously on each of the major railroad carriers throughout the Nation. These notices also include a request that if the proposals are not settled on the individual property the carrier joins with other carriers to authorize a conference committee to represent them on a regional or national level. Such negotiations in years past usually took place on a regional level in Eastern, Western, and Southeastern rail territories. More recently, in 1963, the carriers established a permanent National Railway Labor Conference. This Conference now represents railroad managements in negotiations that are nation-wide in scope. The chairman of the National Railway Labor Conference serves as spokesman and chief negotiator for the industry, although ultimate power to ratify an agreement has typically resided in the regional conference committees composed of representatives from many of the major railroads in a region.

The overwhelming bulk of the industry's approximately 500,000 employees are organized. The industry's major unions have traditionally been viewed as falling into three groups: operating crafts, non-operating crafts, and shopcrafts. In recent years, however, these groupings have had less meaning as the traditional affiliations have changed due both to mergers and to splintering.

The five traditional operating unions represented engineers, firemen, trainmen, conductors and brakemen, and switchmen. In 1969, all but the engineers merged to become the United Transportation Union (UTU), an organization of about 250,000 members and one of the two largest unions in the industry. The engineers remain in their original organization, the Brotherhood of Locomotive Engineers (BLE).

Among the approximately one dozen non-operating craft unions are the Brotherhood of Railway and Airline Clerks (BRAC), the Brotherhood of Maintenance of Way Employees (BMWE), and the Brotherhood

of Railroad Signalmen (BRS). On several occasions prior to World War II, seventeen non-operating railroad labor organizations negotiated national wage and rules movements as a body. After 1945 and until about 1970, the non-operating crafts splintered into various and shifting coalitions for collective bargaining purposes.

The six shopcraft unions, the International Association of Machinists (IAM), the International Brotherhood of Electrical Workers (IBEW), the Brotherhood of Railway Carmen (BRC), the Boilermakers and Blacksmiths (BB), the Sheet Metal Workers (SMWIA), and the Firemen and Oilers (IBFO), traditionally formed the Railway Employees Department (RED) of the AFL-CIO and negotiated as a group. Both the Machinists and the Sheet Metal Workers have recently resigned from the RED, leaving only the other four shopcrafts to bargain together.

Since 1970, there has been increasing pressure on all participants in railroad negotiations to induce all or most of the major unions in the industry to reach some kind of concensus on collective bargaining goals. The major unions and the National Railway Labor Conference have attempted to bargain, if not together, at least at the same time over wages and fringes in order to develop a "pattern" acceptable to all or the overwhelming bulk of the carriers and the employees in the industry. These developments have been strongly encouraged by the government and neutral participants and have met with considerable success. They were only made possible by a common realization that the economics of the industry required an end to leap-frogging and a willingness to yield some share of independent decision-making power in return for a greater degree of security for the employees who now remain in the industry. Although these developments are still far short of Eugene Debs' dream of an industrial union of all railroad workers, they are a major step toward a more unified structure for rail collective bargaining.

The Airline Bargaining Structure

As stated earlier, unlike the railroad industry, in the airline industry bargaining by individual air carriers with those unions representing only their own employees is the rule. The extent of unionization in the airlines is not as great as on the railroads, although the major trunk carriers are substantially organized.

About a dozen unions hold collective bargaining rights in the airline industry. The Air Line Pilots Association (ALPA) is the dominant organization on the flight deck, with only American Airlines' pilots in an independent association. The craft of flight engineers is largely being merged with that of pilots. The Flight Engineers International Association (FEIA) still holds bargaining rights with several carriers, however.

Flight attendants have their own organization, the Association of Flight Attendants (AFA). AFA was formerly a division of ALPA and is still loosely affiliated with it. The Transport Workers Union of America (TWUA) also represents flight attendants on a number of carriers, as does the Teamsters on several smaller airlines. Maintenance employees and mechanics are represented primarily by the IAM or TWUA. Clerical and office employees, if organized, are represented by the Brotherhood of Railroad and Airline Clerks (BRAC), the Air Line Employees Association (ALEA), the International Association of Machinists (IAM), or the Teamsters. The few remaining airline dispatchers are represented by a number of unions; and communication employees by TWUA, IAM, ALEA, or the Communications Workers of America (CWA).

Except for two occasions when the IAM negotiated simultaneously with a group of four or five carriers, individual carrier bargaining, as noted above, has been the rule in the industry. In 1958, a number of major air carriers created the Mutual Aid Pact, a form of strike insurance under which participating carriers make substantial payments to those being struck. This device, strongly opposed by the industry's unions, has the obvious purpose of reducing the vulnerability of a single carrier to a strike called by the more broadly-based unions. In the late 1960's, the industry created the Airline Industrial Relations Conference (AIRCON). This Conference has never attempted to become the bargaining spokesman for the industry. Instead, AIRCON is involved in behind the scenes coordination of inter-company bargaining policy.

The first collective bargaining agreement in the air transport industry was not negotiated by ALPA until 1939, and for all practical purposes strikes were not a problem until after World War II. After 1945, however, strikes began to occur in the industry at an average rate of about four a year, and have continued at roughly the same pace since then. These strikes were of considerable governmental concern between 1946 and 1966, and a number of emergency boards were appointed to help resolve disputes in the industry. Finally, however, the individual carrier bargaining structure that has persisted in the industry made it apparent that a strike against an individual carrier, whatever affect is might have on the parties themselves, only inconvenienced a limited public. As a consequence, since 1966, mediation has been the limit of governmental intervention in the industry's bargaining impasses.

Administration of the Railway Labor Act

The railroad and airline bargaining structure described in the previous section is, of course, partly the creation of the respective parties and partly the result of the requirements of the Railway Labor Act.

That Act has been administered since 1934 by the National Mediation Board. Considering the range of its responsibilities, the economic importance of the two industries, and the nation-wide scope of their operations, the National Mediation Board is a very small agency when compared with most of the Federal bureaucracy.

The Board is composed of three members. Each is nominated by the President and confirmed by the Senate. Both major political parties must be represented in its makeup. Each member is appointed for a three-year term, one term expiring each year. In practice, reappointment of members has been common and only eighteen individuals have been appointed to the Board in over forty years. By recent practice, the chairmanship of the Board has rotated annually among its three members.

The professional staff of the Board is small, consisting of a half-dozen key administrators in the Washington office and about twenty mediators in the field. Mediators for the Board are recruited from the railroad and airline industries and their unions. Occasionally their prior collective bargaining experience has been in both industries or from both sides of the collective bargaining table. Field mediators are stationed in cities along the length of the Atlantic Coast, in a half-dozen major cities in the Midwest, and in California. They are responsible for both mediation and representation cases.

The National Railroad Adjustment Board (NRAB) is an administrative responsibility of the National Mediation Board. In practice, however, the NRAB functions largely autonomously. The headquarters of its four divisions is in Chicago. In recent years, the NRAB has been disposing of slightly over 1,000 grievances per year, considerably fewer than in earlier years. As will be discussed in Chapter VIII, this shift has been brought about by the creation of so-called public law boards which hear and dispose of grievances on the individual railroad properties. Approximately 170 new public law boards are established annually, the neutral members of which are appointed by the National Mediation Board. All of the work of the NRAB and the public law boards involve railroad grievances only. Although the National Mediation Board is authorized to create a National Airlines Adjustment Board, neither the parties nor the Board have ever deemed a national board necessary. However, in cases where the parties to an airline grievance are unable to agree upon a neutral, the National Mediation Board does name the neutral referee.

The present annual budget of the National Mediation Board is about $3 million. Nearly one-half of this amount is spent on the processing of grievance disputes by the Adjustment Board, the remainder being used for the representation and mediation activities of the NMB.

The National Mediation Board classifies the disputes brought to it in one of five ways.[20]

(1) Disputes arise as to who will be the representative for collective bargaining purposes of a given craft or class of employees. Such representation disputes are docketed separately by the Board and are commonly referred to as "R" cases. Policy issues are ordinarily resolved by the three members of the Board, but may be referred to special tribunals.

Representation cases and elections are handled by the Board's field mediators. The Board disposes of fewer than 100 representation cases annually, the actual number varying from 64 to 110 in recent years. About 60 percent of representation cases now arise in the airline industry, most of these among ground service employees.

(2) Mediation cases are assigned after the parties are unable to resolve a dispute concerning changes in rates of pay, rules or working conditions. Mediation cases are docketed separately and are referred to as "A" cases.

Mediation is recognized by labor, management and experienced neutrals as the most useful function government can provide to assist collective bargaining negotiations. Out of the thousands of Section 6 notices that are filed each year with individual rail and air carriers, hundreds are docketed for mediation. Field mediators of the Board meet with the parties and assist them in resolving from 200 to 400 such disputes each year.

(3) The National Mediation Board is authorized to interpret agreements when the parties disagree over the meaning or application of previously agreed-upon mediation settlements. Such interpretation cases are uncommon, arising only three or four times each year.

(4) A certain number of disputes are brought to the Board where it is not readily apparent whether the underlying dispute is over representation or the terms of an agreement. Such disputes are designated "C" cases and assigned to a mediator for investigation on the property. In many of these, the mediator is able to assist the parties in identifying and resolving the problem during the course of his investigation. The number of such cases resolved exceeds 100 annually.

(5) In addition to the four categories of disputes listed above, the Board assigns an "E" designation to situations wherein the Board's services are proffered under the emergency provisions of Section 5, First, (b) of the Act. These cases are generally major or "national" disputes. One of the three members of the Board often participate in them, in active personal mediation, in the proffer of arbitration and in

20. The National Mediation Board makes an *Annual Report* each fiscal year which also includes the report of the National Railroad Adjustment Board. These are available from the U.S. Government Printing Office, Washington, D.C.

the decision whether to recommend to the President the creation of an emergency board. All of these Board functions affecting railroad and airline bargaining—the handling of representation disputes, mediation of bargaining impasses, and the use of voluntary interest arbitration and Presidential emergency boards—are the subjects of Chapters II–VI that follow: